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Before the
FEDERAL COMMUNICATIONS COMMISSION

MAY 11 1994

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of

RICHARD BOTT II
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction
Permit of Station KCVI(FM),
Blackfoot, Idaho

) MM DOCKET NO. 93-155

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) File No. BAPH-920917GO

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To: Administrative Law Judge
Arthur I. Steinberg

MASS MEDIA BUREAU'S ANSWER
TO APPLICATION FOR AWARD
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

1. On April 18, 1994, Richard Bott, II ("Bott"), filed an application for the award of fees and expenses incurred in the above captioned proceeding, pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 ("EAJA"). The Mass Media Bureau hereby submits its answer. See Section 1.1522 of the Commission's Rules.

2. The EAJA provides for the award of fees and other expenses to eligible parties to

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certain administrative proceedings, called "adversary adjudications," before the Commission. The eligible party may receive an award if it prevails over the Commission, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Section 1.1501 of the Commission's Rules. For the reasons which follow, the Bureau submits that Bott's application must be denied.

3. First, the above-captioned proceeding is not the type of administrative proceeding to which the EAJA applies. As the caption thereof clearly establishes, the instant proceeding involves the "[a]ssignment of [the] [c]onstruction [p]ermit of Station KCVI(FM), Blackfoot, Idaho." Hearing Designation Order, 8 FCC Rcd 4074 (1993) ("HDO"). As such, it is not an adversary adjudication.

4. The EAJA excludes proceedings for the granting or renewal of licenses from its definition of "adversary adjudication." 5 U.S.C. Section 504(b)(1)(C)(i). The instant proceeding involves the grant of a construction permit¹. Indeed, the HDO, at p. 4076, explicitly relies upon the authority contained in Section 309(e) of the Communications Act of 1934. In turn, Section 309 is limited to applications for licenses under Section 308, which include applications for grants of "construction permits and station licenses, or modifications or renewals thereof" Section 308(a). Further, in Citizens Committee v. FCC, 436 F.2d 263, 268 (D.C. Cir. 1970), the court of appeals held that applications for approval of

¹ KCVI(FM) is not yet licensed.

the transfer of a license, such as the application at issue here, shall be disposed of under Section 308.

5. Clearly, the instant proceeding does not involve either a Section 308 modification or a renewal of license. In any event, renewals are excluded from the EAJA's applicability. While Section 1.1503(a) of the Commission's Rules recognizes that modifications may be covered, the Rule limits such applicability to modifications which "are otherwise 'adversary adjudications.'" In a Report and Order creating the Rules which implement the EAJA, 88 FCC 2d 1022 (1982), the Commission declined to list the proceedings which it considered covered under the EAJA as "adversary adjudications." Instead, the Commission opined that it would be sufficient to indicate in the Rules that revocation proceedings are covered.

6. This proceeding was distinguished ab initio from a revocation proceeding. In fact, the HDO, at p. 4077, specifically provided for the conversion of the case to a revocation proceeding if Bott failed to appear or an adverse determination was made by the Presiding Judge. Neither event transpired and the case never became a revocation proceeding.

7. Rather, the instant proceeding was a fact-finding inquiry, which sought to determine whether the above-captioned application should be granted. A petition to deny the application had been filed. Pursuant to Section 309(d)(2) of the Communications Act, designation for hearing is required if a substantial and material question of fact is presented by such a petition, or the Commission for any reason is unable to find that the public

interest, convenience and necessity will be served by the granting of an application like Bott's. The mere designation for hearing of such an application does not make a proceeding an "adversary adjudication" for purposes of the EAJA. Indeed, designation for hearing is no more than a recognition by the Commission that a question of fact has been presented in a petition to deny which requires further inquiry.

8. Finally, we submit that an award of fees and expenses to Bott is not warranted because, here, the Commission was justified in instituting the above-captioned proceeding. 5 U.S.C. 504(a)(1). See also Sections 1.1501 and 1.1505 of the Commission's Rules. Bott argues that the Commission's action in designating this case for hearing had no basis in law or fact.

9. Instead, Bott insists, at p. 6, that the designation "rested entirely" upon mischaracterizations of Bott statements made by a petitioner to deny the application. Bott cites to the Summary Decision's finding that Bott did not make a statement attributed to Bott in the HDO. Bott also states, at p. 6, that the Commission, through the Bureau, acknowledged "that it had nothing else before it to suggest that Bott had misrepresented facts to or lacked candor with the Commission in his statements." This is a distortion of the record. The text of the Bureau's statement is as follows:

The Bureau does not possess a copy of a written statement or transcript of an oral presentation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that throughout the comparative proceeding, he has always intended to operate with a commercial religious format.

10. This statement dealt with only one item of evidence. The Bureau did not admit that there was nothing to suggest misrepresentation or lack of candor. Rather, further inquiry was necessary because, at a time when the Commission was concerned about sham and/or short-lived integration proposals, a former competing applicant was alleging that Bott's proposal had been such a sham. Moreover, the Commission had before it what appeared to be inconsistent rationales for Bott's actions.

11. Thus, as set forth in the HDO, the Commission found it "proper to inquire into why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later." HDO at p. 4076. The Commission also stated its belief that "there are substantial and material questions of fact concerning whether Bott, in the course of the comparative licensing proceeding, misled or lacked candor with the Commission about his intention to move to Blackfoot and act as full-time general manager of his proposed station." HDO at p. 4076. We submit that these statements clearly set forth the basis for designating the above-captioned applications for hearing, and that neither is based on an erroneous premise or a misstatement of any key fact. The basis for the designation was the fact that Bott had earlier testified that he had not decided upon a format and later used format as a reason for being unable to proceed.

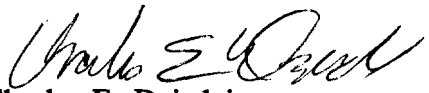
12. In view of this apparent inconsistency alone, the Commission was presented with a substantial and material question of fact which prevented the requisite finding that grant of

the application would be consistent with the public interest, convenience, and necessity.

Under those circumstances the Commission was not only justified in designating the application for hearing, it was required to do so by Section 309(e) of the Communications Act.

13. In sum, Bott's application for award pursuant to the EAJA must be denied. The instant proceeding is not an adversary adjudication to which the EAJA applies. Even if it were, the Commission's designation of the instant proceeding for hearing was substantially justified.

Respectfully submitted,
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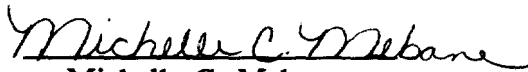
CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 11th day of May, 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Application for Award Pursuant to the Equal Access to Justice Act"** to:

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